

UNITED STATES OF AMERICA,	}	
		No. 2:16-CR-011-JLQ
Plaintiff,		
vs.		MEMORANDUM OPINION RE:
		SENTENCING
JT CLANCY SMITH,	}	
Defendant.		

I. Introduction/Procedural History

Defendant was indicted by the grand jury and charged with Aggravated Sexual Assault and Abusive Sexual Contact in violation of 18 U.S.C. §§ 2241 and 2244 on January 20, 2016. (ECF No. 1). The Indictment charged the alleged offenses occurred between July 14, 2009, and September 9, 2010. Defendant entered a plea of guilty to an Information Superseding Indictment on May 24, 2016. The Information charged Defendant, then age 18, with Abusive Sexual Contact with his cousin, a minor under the age of 12. Defendant entered his plea pursuant to a Plea Agreement (ECF No. 41). The Plea Agreement addressed the offense level calculation, but did not contain an agreement

1 as to the cross-reference to USSG § 2A3.1, and stated both parties “are free to
2 recommend any legal sentence up to the statutory maximum of six years’ imprisonment.”
3 (ECF No. 41, ¶ 9).

4 Defendant filed a Sentencing Memorandum (ECF No. 48) containing objections
5 to the Presentence Investigation Report (“PSR”) and argued for a sentence of time served.
6 The Government’s Sentencing Memorandum (ECF No. 49) argued for a sentence of 66
7 months. The parties jointly recommend a life term of supervised release.

8 **II. Guideline Calculation**

9 The PSR calculated an adjusted offense level of 34. The Probation Office applied
10 a 10-level increase via a cross-reference under USSG 2A3.4(c)(1) which states: “If the
11 offense involved criminal sexual abuse (as defined in 18 USC § 2241 or 2242), apply §
12 2A3.1.” Defendant objects to application of this cross-reference.

13 Neither Section 2241 or 2242 defines “criminal sexual abuse.” Section 2241 is
14 entitled “aggravated sexual abuse” and 2242 is “sexual abuse”. Both of these sections
15 speak to “sexual acts” and the use of force or threat or placing a person in fear. “Sexual
16 act” is defined differently than “sexual contact” in the applicable definitions. 18 USC §
17 2246. Defendant pled to “sexual contact”. The Information charged Defendant with
18 “threatening Minor A and placing Minor A in fear”. The agreed factual statement in the
19 Plea Agreement does not mention threats, but does state the minor victim was “fearful
20 of Smith.” (ECF No. 41, ¶ 5). In *United States v. Morgan*, 164 F.3d 1235 (9th Cir. 1999),
21 the Ninth Circuit affirmed the use of the cross-reference in a case where the defendant
22 had pled to abusive sexual contact. However, the court stated whether the cross-reference
23 applied was “fact dependent,” and focused on whether the acts constituted “criminal
24 sexual abuse.” *Id.* at 1238. In *Morgan*, the defendant had raped the victim while she was
25 partially unconscious from drinking. The Government argues Defendant’s admission in
26 the Plea Agreement that he placed the victim in fear and engaged in sexual contact is
27 sufficient for the cross-reference to apply.

1 The court found at the sentencing hearing the cross-reference did appropriately
2 apply, and the PSR calculation was correct. Accordingly, the total offense level is 31,
3 the criminal history is category I, and the Guideline range is 108 to 135 months.
4 However, as the statutory maximum is 72 months, the maximum Guideline range is 72
5 months. Defendant has argued the correct Guideline calculation is 37 to 46 months. In
6 this unique case, whether the correct Guideline range is 72 months, or 37 to 46 months,
7 does not impact the court's sentence. The court must impose a sentence which is
8 "sufficient, but not greater than necessary," and as set forth *infra*, the § 3553(a) factors
9 are paramount and a variance is appropriate.

10 **III. 3553(a) Factors**

11 The court has considered the nature and circumstances of the offense. The relevant
12 conduct involved the Defendant's cousin, and was not a single occurrence, but was
13 repeated. The wrongful conduct involved the touching of the victim's vagina, but did not
14 involve sexual intercourse. The court has considered the conduct occurred when
15 Defendant was young. According to the victim, the abuse started in May 2009, at which
16 time Defendant was 17-years old. (PSR ¶ 13). The victim's family learned of the abuse
17 in 2010, but chose not to report it to law enforcement. (PSR ¶ 16). The victim has not
18 submitted a Victim Impact Statement to the court, despite being contacted by the
19 prosecution.

20 The court has considered the history and characteristics of the Defendant.
21 Defendant has no other criminal conduct, and has zero criminal history points. As the
22 Government states: "Defendant has absolutely zero criminal history as an adult, zero as
23 a juvenile, no arrests, no pending charges, and no other criminal conduct." (ECF No. 49,
24 p. 6). Defendant has been on pretrial release since January 2016, and according to
25 Probation has been in full compliance. The court has considered Probation's
26 recommendation and report that at the time the offense conduct started Defendant had just
27 dropped out of high school in the 11th grade, was quiet and socially withdrawn, and had

1 been the subject of bullying in school.

2 The court has considered that there must be appropriate punishment and the
3 sentence must reflect the seriousness of the offense and promote respect for the law.
4 Although there are mitigating factors, Defendant's sentencing recommendation of time-
5 served would not serve these goals. Defendant is correct that the non-custodial
6 ramifications of the sentence—including registration as a sex offender and a life term of
7 supervised release are significant. The court has also considered the need for adequate
8 deterrence and the need to protect the public. The Government argues the need to protect
9 the public in support of its recommendation. The court finds the argument unconvincing.
10 Defendant has no other criminal history before this offense, and none in the last seven
11 years since the offense. Further, he has been compliant while supervised on pretrial
12 release for the last six months.

13 The court is impressed with Defendant's extraordinary acceptance of
14 responsibility. As the Government candidly admitted at sentencing, with no complaint
15 to law enforcement until some six years after the offenses, charges likely would not have
16 been pursued in this matter if not for Defendant's admissions to law enforcement agents
17 when interviewed six years after the offenses. The Probation Office reports Defendant
18 is very remorseful. For all the aforesaid reasons, the court determined the appropriate
19 sentence, which is sufficient but not greater than necessary, is 15-months.

20 **IT IS HEREBY ORDERED:**

21 1. Judgment for a custodial term of 15-months and a life term of supervised release
22 shall be entered in accordance with this Order and the court's oral pronouncement at
23 sentencing.

24 2. Defendant shall be allowed to self-report. Defendant orally requested he be
25 released from the condition of electronic/G.P.S. monitoring prior to traveling to self-
26 report at the designated BOP facility. The United States Probation Office may retrieve
27 its monitoring equipment prior to Defendant's departure to the BOP facility. This

1 removal should be done as close in time to Defendant's departure as is reasonably
2 practical in the Probation Office's discretion. Defendant shall not be removed from
3 electronic monitoring more than 48-hours prior to the designated self-report time without
4 seeking approval of the court.

5 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
6 counsel and the United States Probation Office.

7 Dated this 25th day of July, 2016.

8 s/ Justin L. Quackenbush
9 JUSTIN L. QUACKENBUSH
10 SENIOR UNITED STATES DISTRICT JUDGE
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